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Shalina A. Chibber

Indiana University School of Law-Bloomington

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Charting a New Path Toward Gender Equality in India: From Religious Personal Laws to a Uniform Civil Code

SHALINA A. CHIBBER *

INTRODUCTION

In India, only Muslim men may practice polygamy,¹ and Hindu sons inherit greater shares of their parents' estates than their sisters do.² While one's religion determines which law will apply to him or her regarding marriage, divorce, maintenance, guardianship, adoption, inheritance, and succession,³ a common thread woven through all of India's religious personal law systems is the patriarchal dominance of men and the unequal treatment of women. Given the seemingly strong protections of gender equality in India's Constitution, however, it is puzzling that the Indian government can uphold facially discriminatory laws against women, especially when such laws affect women's lives so intimately. In the name of protecting the rights of religious communities, Parliament has thus far skirted its responsibilities to some of the most vulnerable individuals within those communities—the women.

The religious personal law systems of India have not helped Indian women, nor have they been effective in protecting the rights of the religious communities in which Indian women live. Rather, the preservation of these separate laws has served to deepen the division between the majority Hindu population and minority religions, particularly Islam. The personal laws have also perpetuated—and arguably enhanced—tensions between these two groups by reinforcing identities that oppose one another.

India must take care to move away from religious personal laws and toward a uniform civil code, as envisioned by Article 44 of the Indian Constitution.⁴ At present, the debate over a uniform civil code appears hopelessly divided along both political and religious lines. However, the turmoil is rooted in concerns over the process—and who controls that process—much more so than the concept itself. A uniform civil code constructed by a majority Hindu Parliament will not be accepted as legitimate among minority groups no matter how fairly it may be drafted. The answer, then, lies with promoting a process that brings all concerned voices to the table: men and women of all religious communities must be included. To be successful, a uniform civil code needs to reflect India's diversity as well as its commitment to equality.

* J. D. Candidate, 2008, Indiana University School of Law–Bloomington; B.A., 2005, University of Notre Dame. I would like to thank Professor Susan Williams for her insightful comments on gender issues from a constitutional perspective. I would also like to thank Alex Schaefer for his loving support.

1. See MARTHA C. NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH* 229–30 (2000).

2. See Robert D. Baird, *Gender Implications for a Uniform Civil Code*, in *RELIGION AND PERSONAL LAW IN SECULAR INDIA: A CALL TO JUDGMENT* 145, 149 (Gerald James Larson ed., 2001).

3. Laura Dudley Jenkins, *Personal Law and Reservations: Volition and Religion in Contemporary India*, in *RELIGION AND PERSONAL LAW IN SECULAR INDIA*, *supra* note 2, at 104, 104.

4. INDIA CONST. art. 44 (“The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India.”).

This Note is divided into four parts. Part I focuses on the equality provisions and religious protections set forth in the Indian Constitution, their interplay with religious personal laws, and the significance of Article 44. Part II outlines the three basic problems created by the religious personal law systems. It argues that the systems promote the myth of state neutrality at the expense of women's rights; freeze religious reform and thereby silence internal dissent; and intensify the connection between personal law and identity, thus heightening tensions between majority and minority populations and strengthening prejudices. All of these trends weaken the ability of the group and its individuals to manage internal change, obtain protection from the state, and trust the state generally.

Part III details the reasons why the problems caused by religious personal laws cannot be solved piecemeal by the courts, and why the legislature cannot be trusted to draft a legitimate uniform civil code under present circumstances. This Part also rejects as inadequate alternative approaches to a uniform civil code proffered by legal scholars. Finally, Part IV introduces a multistep plan for religious communities—rather than Parliament—to move India toward a uniform civil code that addresses each of the basic problems caused by the religious personal laws. The goal of this gradual process is to bring about new measures for gender equality without displacing political power from religious groups to legislators. By facilitating the transition to a uniform civil code, religious communities will maintain control of the process, thus legitimizing the results and fulfilling India's constitutional vision of unity through diversity.

I. INDIA'S CONSTITUTIONAL VISION: UNITY THROUGH DIVERSITY

When India's Constituent Assembly set out to draft the Indian Constitution in the late 1940s, it was faced with no small task. The country was still recovering from the violent partition of India and Pakistan following India's independence from Great Britain.⁵ While many Muslims left India for Pakistan en masse, those who stayed behind harbored feelings of distrust, rejection, and fear of the majority Hindu population.⁶ Because of the hostility between the Muslim and Hindu populations of India, this Note focuses particularly on the Muslim personal law system and the tension between the Muslim minority and Hindu majority regarding the debate over a uniform civil code.

In the context of this religious turmoil, the Constituent Assembly was especially concerned with minority and religious rights.⁷ On the other hand, the drafters also sought to provide equality among all individuals regardless of religion, caste, or sex, as the Constitution's equality provisions demonstrate.⁸ Thus, it has been said that the genius of the Indian Constitution is its secular ambiguity—in other words, its strength has been in its ability to pay deference to religious sensitivities in a religiously

5. See ARCHANA PARASHAR, *WOMEN AND FAMILY LAW REFORM IN INDIA: UNIFORM CIVIL CODE AND GENDER EQUALITY* 158 (1992) (describing partition as a "communal holocaust" that "left thousands dead and many thousands displaced, in both countries").

6. *Id.*

7. See James Chiriyankandath, 'Creating a Secular State in a Religious Country': *The Debate in the Indian Constituent Assembly*, COMMONWEALTH & COMP. POL., Jul. 2000, at 1, 1–2.

8. See INDIA CONST. arts. 14–16.

pluralistic society while still retaining the secular quality of dedication to individual rights regardless of religion.⁹ Jawaharlal Nehru, India's first prime minister and a key personality behind the Indian Constitution, supported this nuanced approach, "declaring in November 1948 that the 'glory of India has been the way in which it manages to keep two things going at the same time: . . . infinite variety and . . . unity in that variety.'"¹⁰

Part I of this Note first considers the constitutional provisions for gender equality and their effect, if any, on religious personal laws. Second, it argues that the religious protection that the Constitution affords to minority groups regrettably traded legislative political power for religious political power, thus strengthening the bond between Muslim identity and Muslim personal law. Lastly, it discusses the significance of Article 44's promotion of a uniform civil code in light of the persistence of religious personal laws.

A. Protection of Gender Equality

The promotion of gender equality in India's Constitution begins with Article 14, which provides that "[t]he State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."¹¹ Article 15 reinforces this, providing that "[t]he State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them."¹² With the apparent purpose to effectuate these equality provisions, Article 13 states that all "laws in force" in India at the commencement of the Constitution, "in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void."¹³

On their face, Articles 13, 14, and 15 appear to guarantee women's equality with men and render religious personal laws, which were in force at the time of the Constitution's commencement, void to the extent that they are inconsistent with the equality provisions. However, the constitutional status of religious personal laws has not been as clear cut for Indian courts. The Indian Supreme Court has never directly

9. See Chiriyankandath, *supra* note 7, at 1 ("One reason for [the Indian Constitution's] durability has been its deliberate (and necessary) ambiguity in dealing with potentially explosive issues of religious identity."). Susanne and Lloyd Rudolph argue that Indian law and politics have been a contest between legal pluralism, which gives expression to a multicultural society, and legal universalism, which is concerned with equal and uniform citizenship. Susanne Hoerber Rudolph & Lloyd I. Rudolph, *Living With Difference in India: Legal Pluralism and Legal Universalism in Historical Context*, in RELIGION AND PERSONAL LAW IN SECULAR INDIA, *supra* note 2, at 36.

10. Chiriyankandath, *supra* note 7, at 10 (quoting 7 CONSTITUENT ASSEMBLY DEBATES: OFFICIAL REPORT 323 (1948)) (alterations in original).

11. INDIA CONST. art. 14. The language of this Article promotes both formal equality and substantive equality.

12. INDIA CONST. art. 15. The Article also specifically prohibits discrimination on the same grounds in access to places of public accommodation and further provides for affirmative action for women, children, and the "socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes." *Id.*

13. INDIA CONST. art. 13. It should be noted that Articles 14 and 15 are in the same "Part" as Article 13.

addressed the issue, while lower courts are split on the Constitution's applicability to religious personal laws.¹⁴

At the very least, the neutralizing effect of the case law has delayed the realization of Articles 14 and 15 for most women.¹⁵ The real disappointment of the courts' waffling over the treatment of personal laws is that these are the laws that affect Indian women's lives most intimately. For example, a Muslim Indian woman may be unilaterally divorced by her husband without cause, while that same woman may only obtain a divorce on statutorily specified grounds.¹⁶ Likewise, under Christian law, a man may obtain a divorce when his wife has committed adultery, while a Christian woman seeking divorce is required to prove at least two offenses by her husband, such as adultery with cruelty or adultery with desertion.¹⁷ Under both Hindu and Muslim law, the father is the natural guardian of legitimate children and a Hindu husband is also the natural guardian of his wife if she is a minor.¹⁸

What is the benefit of having progressive equality provisions in the Constitution when they will not apply to a woman's rights under marriage, including whether she is allowed custody of her children? All of India's religious personal law systems suffer from "gross sex inequalities."¹⁹ Their shelter, thus far, from real constitutional scrutiny makes a mockery of India's constitutional commitment to equality and fails to provide women with the protection they deserve.

B. Protection of Religious Groups

Article 25 of the Constitution provides for freedom of religion "[s]ubject to public order, morality and health and to the other provisions of this Part."²⁰ The state is further able to regulate or restrict "any economic, financial, political, or other secular

14. Kirsten K. Davis, *Equal Protection for Women in India and Canada: An Examination and Comparison of Sex Equality Provisions in the Indian and Canadian Constitutions*, 13 ARIZ. J. INT'L & COMP. L. 31, 46 n.98 (1996). Compare *Kaur v. Choudry*, A.I.R. 1984 Del. 66, 75 (India) (resisting application of the Constitution to a Hindu law for restitution of conjugal rights on the policy of preserving marriage, reasoning that "[i]n the privacy of the home and the married life neither Art. 21 nor Art. 14 have any place"), and *State of Bombay v. Mali*, A.I.R. 1952 Bom. 84, 89 (India), *abrogated by In re Amina*, A.I.R. 1992 Bom. 214, 219 (India) (holding that a Muslim law permitting bigamous marriages was not a "law in force" and thus outside the reach of the Constitution and in any case, the law would not be held to discriminate against gender because the law was based on "vital and compelling" social, economic, and religious grounds), with *In re Amina*, A.I.R. 1992 Bom. 214 (India) (overruling *Mali* and holding that personal laws are "laws in force" under Article 13 of the Constitution).

15. However, bringing personal laws under the Constitution would still not be the most optimal solution because the change for women would be a slow, piecemeal process not conducive to providing justice on a large scale. See *infra* Part III.A. Still, constitutional scrutiny of personal laws would provide women with better protection than the current scheme.

16. PARASHAR, *supra* note 5, at 287.

17. *Id.*

18. *Id.* at 292.

19. Martha C. Nussbaum, *India: Implementing Sex Equality Through Law*, 2 CHI. J. INT'L L. 35, 40 (2001).

20. INDIA CONST. art. 25(1). It is of note that "this Part" includes Articles 14 and 15.

activity which may be associated with religious practice.”²¹ Article 26 provides religious protection, allowing every religious denomination the right “to manage its own affairs in matters of religion.”²² Article 29 protects cultural minorities by providing that any minority group in India “having a distinct language, script or culture of its own shall have the right to conserve the same.”²³

The constitutional provisions protecting religious and minority groups are reconcilable with Articles 14 and 15. Religious practice that violates gender equality can, in theory, be prohibited without violating the Constitution pursuant to the limiting factors of Article 25. It is notable that the words “personal law” do not appear in any of the religious provisions of the Constitution. Here, as with the equality provisions discussed above, religious personal law appears to fly under the radar, avoiding constitutional scrutiny despite their blatant deviations from gender equality.

Religious personal law is absent from the Constitution, but it is persistent in Indian culture. To understand this, it is necessary to understand the aims of the Constituent Assembly. In 1947, the nationalists, including Nehru, held the opinion “that group-based norms and practices, such as separate electorates [and] reserved seats . . . were responsible for the partition of the subcontinent.”²⁴ Before the Constitution, minority groups, including Muslims and Christians, had reserved seats in Parliament.²⁵ But because nationalists were of the opinion that minority safeguards were responsible for deepening the divide between Muslims and Hindus, the Assembly abolished reserved seats for all minorities.²⁶

Muslims were a vulnerable group during this period, as sixty percent of the pre-partition Indian Muslim population had moved to Pakistan.²⁷ On the issue of reserved seats, the Muslim community was split; “[u]ltimately it would decide . . . to forgo even reservations in the Legislature, hoping by its sacrifice to ensure fair treatment from the Hindu majority.”²⁸ Thus, the Muslim community was essentially sacrificing its legislative political power in hopes of securing at least its religious political power. Nehru and others, despite their ideology that separate treatment was the root of the problem, conceded that in reality, Muslims were going to need special guarantees to provide “reassurance that their corporate identity was recognized and that their

21. INDIA CONST. art. 25(2)(a).

22. INDIA CONST. art. 26(b). Articles 27 and 28 also grant religious rights pertaining to taxes and religious instruction. *See* INDIA CONST. arts. 27–28.

23. INDIA CONST. art. 29.

24. Rudolph & Rudolph, *supra* note 9, at 47. The nationalists dominated the Constituent Assembly and they were “determined to deny that religious identities trumped all others.” *Id.*

25. *See id.* at 47–48.

26. *Id.* Reserved seats for scheduled castes and tribes were maintained in the Constitution in Article 243D. *Id.*

27. *Id.* at 48; *see also* PARASHAR, *supra* note 5, at 158 (“[Muslims] were in the unenviable position of being identified with Pakistan while being citizens of India. They were perceived by the majority as having voted for the creation of Pakistan and, having therefore, explicitly forfeited any claim to special status in the now independent State of India.”).

28. Rudolph & Rudolph, *supra* note 9, at 48 (quoting GRANVILLE AUSTIN, *THE INDIAN CONSTITUTION* 151 (1966)).

corporate life was secure.”²⁹ That reassurance came in the “form of allowing the Muslim community to preserve and practice their personal law.”³⁰

The government is under no constitutional obligation to maintain the system of religious personal laws.³¹ However, the Assembly’s decision to strip Muslims and other minorities of a secured position in the secular framework of government pushed Muslims further into an outsider role and guaranteed the result that Muslim identity would become conflated with Muslim personal laws. The nationalists were correct in seeing a link between group-based norms and inter-group conflict; yet they were complicit in perpetuating this problem between Muslims and Hindus in India through the preservation of religious personal laws.

C. The Place for a Uniform Civil Code

The highly debated Article 44 of the Indian Constitution provides that “[t]he State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India.”³² If ever fulfilled, Article 44 would almost certainly sound the end to religious personal law, requiring all Indians to be governed by one secular civil code.³³ There is, however, no guarantee that this will ever happen because the Article is found in the Constitution’s Directive Principles and is therefore not judicially enforceable.³⁴ This designation of the Article as a Directive Principle was driven by the Assembly’s desire to achieve national unity—and not gender equality—by reassuring Muslims that their personal laws would not be upset.³⁵

The Constitution provides no timeline for the implementation of Article 44, nor does it provide any process by which it should be drafted. Professor Archana Parashar argues that the benign placement of Article 44 demonstrates that the Constituent

29. *Id.*

30. *Id.* at 49. The government maintained all the religious personal law systems, and not just Muslim law.

31. See PARASHAR, *supra* note 5, at 160 (quoting the Law Minister of the Constituent Assembly to say, “I shall hear no argument from any community to say that this Parliament has no right to interfere in their personal law or any other laws”); Pratibha Jain, *Balancing Minority Rights and Gender Justice: The Impact of Protecting Multiculturalism on Women’s Rights in India*, 23 BERKELEY J. INT’L L. 201, 210 (2005) (relying on the Constitution to argue that all group rights granted to minorities are subject to state intervention).

32. INDIA CONST. art. 44.

33. See PARASHAR, *supra* note 5, at 261 (explaining that while a uniform civil code could technically be created to coexist with religious personal law, an optional code would make it “almost certain that the majority of women will not be able to take advantage of the enhanced legal rights which it provides”).

34. INDIA CONST. art. 37 (“The provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.”).

35. See PARASHAR, *supra* note 5, at 235–36 (noting that the drafters understood that a justiciable uniform civil code would be consistent with the equality provisions of the Constitution, but that they did not want to alienate the Muslims). Parashar concludes that “[t]he final shape taken by the article on a [uniform civil code] indicates the greater importance attached by the (mainly male) Constitution makers to achieving national unity than to ensuring legal equality for women.” *Id.* at 236.

Assembly accepted gender equality in the abstract, but was not truly committed to bringing about concrete legal rights for women.³⁶ The current Parliament likely has the same priorities because Muslims—and not women—are a formidable voting bloc.³⁷

Article 44 has not found much favor within the Muslim community. Indeed, the Article is sometimes referred to as a “Damocles Sword” dangling over the heads of all religious groups because its existence serves as a continual threat to their control over personal laws.³⁸ Religious minorities have valid reasons to worry that a uniform civil code would not reflect their values, especially in light of another Directive Principle that aims toward the eventual ban on cow slaughter throughout India.³⁹ Such an obviously Hindu-centric value in a Constitution purporting to be based on secularism⁴⁰ raises doubts regarding the state’s ability to be impartial in its policy toward religion.⁴¹

The Indian Constitution’s gender equality provisions and its protection of religious practices subject to those provisions appear to provide Indian women with assurance that their rights will be equal to those of men. However, the operation of religious personal laws largely outside the reach of the Constitution has left women vulnerable. Given the patriarchal bias present in all religious personal laws, Indian women will not be able to realize their constitutional right to equality until these laws are exchanged for a uniform civil code that both reflects the values of all groups within India and adheres to the constitutional commitment to gender equality.

II. THE PROBLEM WITH RELIGIOUS PERSONAL LAWS

Preservation of the religious personal laws into the post-colonial era may have been necessary under the circumstances at independence, but their continuation into the twenty-first century has caused injury to India’s religious minorities as well as to Indian women of every religion. Failure to implement a uniform civil code has reinforced differences between Hindus and Muslims and left women more vulnerable as a result. “Instead of moving toward a secular, equality-based legal system, the recognition of personal laws under the guise of protecting minorities from a dominant majority culture helped institutionalize patriarchal traditional practices that disadvantage Indian women.”⁴²

This Part focuses on the three main problems that have resulted from maintaining religious personal law systems in India. First, the laws have perpetuated a myth of state

36. *Id.* at 236.

37. See Nawaz B. Mody, *The Press in India: The Shah Bano Judgment and Its Aftermath*, 27 ASIAN SURVEY 935, 948 (1987) (“It is an undeniable fact that no party has been able to win elections at the national level without the support of the Muslim vote.”).

38. Bader Sayeed, *Need for Codification*, THE HINDU, July 25, 2000.

39. INDIA CONST. art. 48.

40. See *Kesavananda v. State of Kerala*, A.I.R. 1973 S.C. 1461, 1463 (India) (holding that secularism is part of the structural feature of the Constitution).

41. See Vrinda Narain, *Women’s Rights and the Accommodation of “Difference:” Muslim Women in India*, 8 S. CAL. REV. L. & WOMEN’S STUD. 43, 62 (1999) (“One objection raised by the Muslim community to the enactment of a [uniform civil code] is the fear that it would be influenced by a Hindu perspective presented as neutral and secular, and this fear must be addressed.”).

42. Jain, *supra* note 31, at 211–12.

neutrality, while in reality, the government inevitably takes sides in religion when it transfers political power to religious leaders. Second, religious personal laws have had the effect of “freezing” minority religious cultures, thereby silencing internal dissent. Lastly, the existence of the laws has inflated the importance to Muslims of maintaining a group identity that is distinct from the state, thus intensifying intergroup distrust and hostility.

A. The Myth of State Neutrality

No government can delegate its lawmaking authority to religious groups without taking a side in religion. The government may claim its neutrality, but the government gave *someone* power, and in doing so, it denied power to others. Within Muslim communities in India, that power was granted to the *Ulema*, the all-male conservative religious clerics.⁴³ By “conceding power to patriarchal leaders of private groups without engaging the diversity of views within cultural communities,” the Indian government effectively sanctioned “traditional views of religion over the claims of dissenting women.”⁴⁴ Thus, the state is not a passive actor when it leaves personal laws to be decided by religious groups; rather, the state is actively legitimizing “certain interpretations of an identity group’s culture over other possible competing interpretations.”⁴⁵

The Indian government continues to favor the interpretations of the *Ulema* at the expense of women within Muslim communities. For example, in the wake of the *Shah Bano* case,⁴⁶ the government ushered through the Muslim Women’s (Protection of Rights on Divorce) Act, ignoring the opposition of many Muslim women and treating “the *Ulema* as the voice of the whole community.”⁴⁷ When the government chooses sides in divisive religious matters, it simultaneously disregards minority women’s rights and heightens intergroup tension because the majority construes the state action as conferring “special privileges” on the minority.⁴⁸

Preservation of the religious family law systems in India perpetuates the state bias in favor of certain minority members over others. Thus, the government’s lack of neutrality serves as a practical disadvantage against women because those chosen to make the laws tend to be conservative men with traditional views about women’s role in the community. As explained in the following section, once the power to make personal laws is in the hands of these religious leaders, women have a difficult time getting their voices heard and their rights protected.

43. See Narain, *supra* note 41, at 47.

44. Madhavi Sunder, *Piercing the Veil*, 112 YALE L.J. 1399, 1461 (2003).

45. AYELET SHACHAR, MULTICULTURAL JURISDICTIONS: CULTURAL DIFFERENCES AND WOMEN’S RIGHTS 39 (2001).

46. See *infra* Part II.B.

47. Nussbaum, *supra* note 19, at 45. Six Indian women’s organizations met with the Prime Minister to request that the Act not be passed but were ultimately ignored. PARASHAR, *supra* note 5, at 179.

48. See Nussbaum, *supra* note 19, at 45 (noting that Hindu men complained of discrimination against the majority because only Muslim men were exempted from long-term maintenance payments).

B. Freezing Culture and Silencing Internal Dissent

Once religious power within a group is equated with political power outside of it, the stakes for internal dissent are higher for the entire community. A challenge to religious leadership is translated into a challenge to the group's legitimacy in the political world; those who question become traitors to the faith.⁴⁹ Professor Ayelet Shachar states that "state-sanctioned delegation of jurisdiction to authorities within an identity group . . . plays right into the hands of power-holders in the group" allowing leaders to define any challenge to the group's practices as a corruption.⁵⁰ Hence, within Indian minority groups, religious personal law has resulted in quelling internal dissent for the sake of the group at the expense of the individual.

Professor Madhavi Sunder describes religious communities as "internally contested, heterogeneous, and constantly evolving over time through internal debate and interaction with outsiders."⁵¹ Muslim religious leaders in India commonly assert that Muslim personal law cannot be altered by the government because it is based on the *shariat*. To the contrary, history shows that the *Ulema*, the sole interpreter of Islamic law, has allowed deviations from that law from time to time.⁵² Nevertheless, where a group's power is based on its distinct identity from the majority, group leaders stress loyalty and obedience over reform of individual rights that may bring the group's identity into closer conformity with the majority.⁵³

When an individual member of a minority community seeks protection from the state in opposition to her group's laws or customs, she is effectively being forced to choose between her rights and her community.⁵⁴ Taking a stand risks the real possibility that friends and family will turn against her, while remaining silent deprives her of any meaningful rights. In this way, protection of the individual is pitted against the autonomy of the group and a zero-sum game arises whenever the interests of the two are not aligned.

Consider the story of Shah Bano: In 1978, a seventy-three-year-old Muslim woman named Shah Bano was unilaterally divorced by her affluent lawyer husband after forty-three years of marriage.⁵⁵ After becoming impoverished, she appealed to the courts for maintenance under section 125 of the Criminal Penal Code—a code that applies to all

49. See SHACHAR, *supra* note 45, at 39 ("Members who attempt to bring about in-group changes, by suggesting a less gender-biased reading of its family law practices, for example, are consequently open to accusations of cultural betrayal.").

50. *Id.*

51. Sunder, *supra* note 44, at 1402–03.

52. See PARASHAR, *supra* note 5, at 59 (citing examples of when the *Ulema* has made adjustments to fit certain circumstances, such as sanctioning the regulations of political rulers that were not in conformity with religious precepts). Parashar argues "that religious personal laws have developed to reach their present form due to human endeavour and, just as they have undergone a change in the past so they can be modified to accord with the changed circumstances of the present." *Id.* at 47.

53. See SHACHAR, *supra* note 45, at 39 (explaining the pressure that is placed on "women insiders to relinquish their individual citizenship rights and to demonstrate group loyalty by accepting the standard interpretation of group doctrine as the only correct reading of their group's tradition").

54. See Sunder, *supra* note 44, at 1410.

55. See SHACHAR, *supra* note 45, at 81.

Indians regardless of religion.⁵⁶ Her husband argued that section 125 did not apply to him because Muslim law obligated him only to pay maintenance during the period of *iddat*.⁵⁷ Ruling in *Shah Bano*'s favor, Chief Justice Chandrachud of the Supreme Court noted that the Criminal Penal Code overrides personal law when there is conflict,⁵⁸ but the Court ultimately held that no conflict between the laws existed here because Islamic law obligates husbands to provide maintenance to impoverished wives beyond the *iddat* period in certain circumstances.⁵⁹

The *Shah Bano* decision outraged the Muslim community because a "non-Muslim, secular jurist trained only in secular law interpreted significant Islamic law principles, upon which there is not even consensus among trained Islamic legal scholars."⁶⁰ Muslims were equally angered over Chandrachud's disrespectful tone toward Islam.⁶¹ The opinion created further controversy because in dicta, Chandrachud urged the Parliament to follow through on drafting a uniform civil code, thus reinforcing Muslim fears about losing group autonomy and identity.⁶² The interference with Islamic law coupled with the threat of a uniform civil code sparked Muslim protests nationwide.⁶³ In response, the Congress party rushed through Parliament the Muslim Women's (Protection of Rights on Divorce) Act.⁶⁴ Despite its benign-sounding name, the Act was intended to reverse the *Shah Bano* decision by exempting Muslim men from section 125 of the Criminal Penal Code.⁶⁵

After seven years of litigation, *Shah Bano* renounced any award she may have received from the favorable decision, stating that she was unaware that what she was seeking was against Muslim law.⁶⁶ In the end, what is surprising is not her renunciation of the maintenance, but her strength in the face of so much opposition to fight for it in the first place. There are not many *Shah Banos*; the majority of the women in her situation will go unnoticed by the courts.⁶⁷

56. *Khan v. Begum*, A.I.R. 1985 S.C. 945, 946-47 (India) (*Shah Bano*).

57. *Id.* at 947. *Iddat* is an approximately three-month period following a divorce during which remarriage is prohibited. Jain, *supra* note 31, at 215.

58. *Shah Bano*, A.I.R. 1985 S.C. at 949.

59. *Id.* at 951.

60. Seval Yildirim, *Expanding Secularism's Scope: An Indian Case Study*, 52 AM. J. COMP. L. 901, 914 (2004).

61. *See infra* Part III.A.

62. *See Shah Bano*, A.I.R. 1985 S.C. at 954.

63. *See Yildirim*, *supra* note 60, at 914. In the aftermath of the *Shah Bano* decision, Muslim leaders traveled the country organizing rallies and leading protest marches of hundreds of thousands of Muslims. This insured that the issue would become a political problem for the leading Congress party. *See PARASHAR*, *supra* note 5, at 174-75.

64. Mody, *supra* note 37, at 948-49.

65. *Id.* at 949. However, in *Latifi v. Union of India*, A.I.R. 2001 S.C. 3958, 3973 (India), the Supreme Court interpreted the Act as a validation and not a reversal of *Shah Bano*, by holding that a Muslim woman was still entitled to relief under section 125 if her ex-husband failed to provide her reasonable maintenance *for life* in the *iddat* period. To hold otherwise, the Court said, would render the Act unconstitutional. *Id.* at 3972.

66. *See Nussbaum*, *supra* note 19, at 45.

67. *See Sylvia Vatuk*, "Where Will She Go? What Will She Do?" *Paternalism Toward Women in the Administration of Muslim Personal Law in Contemporary India*, in RELIGION AND PERSONAL LAW IN SECULAR INDIA, *supra* note 2, at 226, 240 ("Very few Muslim matrimonial

The preservation of religious personal law systems undoubtedly perpetuates an oppositional relationship between the group and the individual seeking rights denied her by that group. As Muslims feel increasingly under fire as a community, the concerns of the group will find favor over those of the individual and this will lead to the loss of rights for Muslim women.⁶⁸

C. Importance of Maintaining Group Identity as Distinct from the State

A significant consequence of the religious personal law systems in India is the emphasis on the personal laws as signifiers of identity for the religious group.⁶⁹ Because the political power of religious groups rests on the belief that these groups are in some important respects different from one another, the preservation of their identities—and power—demands this separate system of laws.⁷⁰ Given this understanding, what incentive does any group have to allow its identity to naturally evolve and change? For if its identity evolves to the point that the distinctions between it and the majority group are no longer significant, the group's claim for political power is without merit. From the religious leaders' point of view, it is better that the culture maintain at least the perception of distinctiveness.

The Muslim community in India (in large part through its leadership) has responded to a perceived threat to its identity by exhibiting what Professor Shachar calls "reactive culturalism."⁷¹ The "response entails a strict adherence to a group's traditional laws, norms, and practices as part of an identity group's active resistance to external forces of change, such as secularism or modernity."⁷² The group therefore does more than merely freeze internal reform; there is actually a concerted effort on the part of the group's leaders to move the group backwards in time to more traditional practices.⁷³

Under reactive culturalism, images of women and family become symbols of the group's authentic self, and thus, interference with the way in which women and family

disputes ever reach the courts: they are nearly always dealt with informally at the family and community level and with the help of various kinds of religious bodies, functionaries, and private religio-legal experts. . . . [E]ven in situations where they have the same opportunity to obtain relief under the law, Muslims are less likely to do so than Hindus or Christians.").

68. For an example of how individual rights are threatened when they are in opposition to group rights:

[M]uch of the Muslim community, feeling its honor slighted and its civic position threatened [by the *Shah Bano* decision], rallied round the cause of denying women maintenance. Women were barely consulted when statements were made about what Indian Muslims wished and thought; an impression was created by the Ulama that all Muslims disagreed with the judgment.

Nussbaum, *supra* note 19, at 45.

69. Narain, *supra* note 41, at 50.

70. See Mody, *supra* note 37, at 946 ("It is increasingly believed that it is important for Muslims to view their interest as a community, not because they are one, but because they are perceived as one. This unity would increase their bargaining position in the bread and butter issues of politics.").

71. SHACHAR, *supra* note 45, at 35.

72. *Id.*

73. See Sunder, *supra* note 44, at 1462 (arguing that "many in the Muslim world seek to maintain their religious identity in what appears to be the only place remaining—the past").

life are governed have heightened significance for the group.⁷⁴ In India, this point is evidenced by the *Ulema*'s history of reforming the personal law so as to have more control over Muslim women without remedying the legal disparities between men and women.⁷⁵

Granville Austin argues that "[m]odernization, economic progress, and education, especially for women, are likely to decrease the Muslims' sense of isolation in society and their consequently tenacious grip on their personal law as an essential identifier."⁷⁶ In this sense, progress for Muslim women itself threatens Muslim identity by virtue of weakening support for Muslim personal laws.⁷⁷ Thus, both internal change and external pressures give rise to Muslim reactive culturalism.

Debate over a uniform civil code serves as a constant external threat to Muslim identity. The three most recent periods of heated debate over a uniform civil code coincided with the three Supreme Court opinions that have suggested in dicta that Parliament start working on a code. While *Shah Bano* may have been the most explosive of the three, two more recent cases managed to reignite the political fires and to reinforce minority group opposition to the idea of a uniform civil code.

In *Mudgal v. Union of India*, the Supreme Court heard a case regarding four Hindu husbands who converted to Islam for the sole purpose of taking additional wives, which is allowed under the Muslim personal laws.⁷⁸ The Court held that the second marriage of a Hindu husband after his conversion to Islam is a void marriage and the converted husband is guilty of bigamy, a practice proscribed under Hindu marriage laws.⁷⁹ In dicta, the Court recited the *Shah Bano* dicta in favor of a uniform civil code and added its own reasoning:

Those who preferred to remain in India after the partition, fully knew that the Indian leaders did not believe in two-nation or three-nation theory and that in the Indian Republic there was to be only one Nation—Indian nation—and no community could claim to remain a separate entity on the basis of religion.⁸⁰

Such statements reinforced fear among Muslims that their identity was under siege.

In the most recent Supreme Court case advancing a uniform civil code, the Court examined a section of the Indian Succession Act that affected only the rights of Christians to make charitable or religious bequests.⁸¹ In declaring that section

74. SHACHAR, *supra* note 45, at 36. "Religious norms shape the everyday lives of Indian women in very tangible ways and their replacement by any other value is bound to be resisted, particularly because, for the majority of women, issues of feminism and equal rights do not have any reality." PARASHAR, *supra* note 5, at 35.

75. See Narain, *supra* note 41, at 47.

76. Granville Austin, *Religion, Personal Law, and Identity in India*, in RELIGION AND PERSONAL LAW IN SECULAR INDIA, *supra* note 2, at 15, 22–23.

77. See Mody, *supra* note 37, at 951 (arguing that issues like the *Shah Bano* controversy empower Islamic mullahs by improving "their strong hold on the largely illiterate Muslim population who can easily be swayed by the warning, 'Islam is in Danger'").

78. A.I.R. 1995 S.C. 1531, 1533 (India).

79. *Id.* at 1539.

80. *Id.*

81. Vallamattom v. Union of India, A.I.R. 2003 S.C. 2902, 2906 (India).

unconstitutional because it violated Article 14, the Court reiterated the sentiment of the previous two cases:

It is a matter of regret that Art. 44 of the Constitution has not been given effect to. Parliament is still to step in for framing a common civil code in the country. A common civil code will help the cause of national integration by removing the contradictions based on ideologies.⁸²

The decision sparked political debate and nationwide controversy, and Muslim leaders have since made clear their rejection of any proposed uniform civil code.⁸³

The religious personal law system in India has resulted in less justice for women and more tension between minority and majority religions. At its foundation, the state violates constitutional secular ideals by validating the ideals of certain members in religious communities over those of others. This transformation of religious power into political power freezes internal dissent and further endangers the situation for women seeking rights that are in conflict with group autonomy. Lastly, both internal reform, such as women's education, and external pressure, such as the call for a uniform civil code, have prompted Muslims to withdraw and cling to traditional notions of gender and family. Because religious personal law systems fail to secure women's equality and exacerbate intergroup tensions, they must find their end in the eventual adoption of a uniform civil code.

III. THE NEED FOR A UNIFORM CIVIL CODE IN INDIA

Despite the hostile divide along religious and political lines in India regarding adoption of a uniform civil code, India must nonetheless work to reframe the debate and eventually realize its constitutional vision. This Part argues that the Supreme Court is not capable of solving the problems between religious rights and gender equality because of the piecemeal fashion under which the laws must change and the Court's poor public relationship with Muslims. Likewise, Parliament is unsuited to draft a uniform civil code, given the damage politicization of the debate has already done and the distrust minority groups have of the majority Hindu Parliament. Finally, this Part rejects solutions forwarded by others that are alternatives to a uniform civil code. It argues that such alternatives are insufficient because they do not address the basic problems that persist under the religious personal law systems.

A. The Supreme Court Is Inadequate in the Realm of Personal Law

Attempting to modify religious personal laws through the court systems of India is neither ideal nor practical. As noted earlier, relying on the courts for change requires

82. *Id.* at 2913.

83. See *Muslim Law Board Rules Out Acceptance of Uniform Civil Code*, HINDUSTAN TIMES, Feb. 1, 2006 (spokesman for the Board stated that if a uniform civil code is ever implemented, Muslims should be exempt); *Scrap Uniform Civil Code Provision: Muslim Board*, INDO-ASIAN NEWS SERVICE, Feb. 1, 2006 (spokesman for the Board stated "[t]he provision of the uniform civil code as enshrined in article 44 of the Indian constitution dangles like a sword over our necks. It is therefore necessary to have the provision completely knocked off.").

that disadvantaged group members come forward, overcoming strong community pressure to remain silent, and then withstand years of litigation that will overburden the courts and further threaten the identities of minority groups.⁸⁴ Moreover, even if the Constitution is made directly applicable to the religious personal laws, the piecemeal fashion of evaluating such diverse laws will be a never-ending process of litigation that cannot efficiently or effectively bring about justice for women. Chief Justice Chandrachud himself admitted the Court's limitations:

Inevitably, the role of the reformer has to be assumed by the courts because, it is beyond the endurance of sensitive minds to allow injustice to be suffered when it is so palpable. But piecemeal attempts of courts to bridge the gap between personal laws cannot take the place of a common Civil Code. Justice to all is a far more satisfactory way of dispensing justice than justice from case to case.⁸⁵

The Court should not be called upon to transform personal laws with their multitude of gender inequalities one case at a time; justice demands uniform action.

Finally, the Supreme Court has failed to show adequate respect for the Muslim community regarding its personal law, and in some cases, the Court appears to blatantly favor the majority's religion and culture.⁸⁶ Martha Nussbaum makes the seemingly obvious statement that "[j]udges should not insult the religions, and they should be especially cautious in dealing with the affairs of a religious minority."⁸⁷ Chief Justice Chandrachud, writing for the Court in *Shah Bano*, does not seem to have had the benefit of Nussbaum's wisdom because he began the opinion by criticizing Islam's treatment of women: "it is alleged that the 'fatal point in Islam is the degradation of woman.'"⁸⁸ When the Court lacks sensitivity with such a serious issue, religious minorities are given no reason to feel as though their religious values are

84. See *supra* note 67.

85. Khan v. Begum, A.I.R. 1985 S.C. 945, 954 (India) (*Shah Bano*).

86. There are two strong examples of when the Supreme Court showed a clear bias in favor of majority religious and cultural viewpoints. First, in *Quareshi v. State of Bihar*, A.I.R. 1958 S.C. 731 (India), the Court held that a state law banning cow slaughter did not violate Muslims' religious rights because the Quran did not require cow sacrifice and there were economic, and therefore secular, reasons for the legislation. Yildirim, *supra* note 60, at 912. The Court seemed to ignore the fact that the real reason behind the legislation was the Hindu belief that cows are sacred. Second, in *Prabhoo v. Kunte*, A.I.R. 1996 S.C. 1113 (India), the Court held that election propaganda calling for a return to *Hindutva*, a term referring to Hindu identity, was not in violation of a statute prohibiting the appeal to religion in elections because the Court found that *Hindutva* was not a religious ideology, but rather a "way of life of the people in the subcontinent." Yildirim, *supra* note 60, at 915-16. These decisions demonstrate the way in which the Court is unwilling "to deny the dominant religious group's attempts to define the cultural fabric of India in its own image." *Id.* at 916.

87. Nussbaum, *supra* note 19, at 46.

88. *Shah Bano*, A.I.R. 1985 S.C. at 946 (quoting Edward William Lane, SELECTIONS FROM KURAN (1843)). It matters little that Chandrachud preceded this quotation with an example of Hinduism's similarly traditional oppression of women by quoting Manu, the law giver, "[T]he woman does not deserve independence." *Id.* This weak attempt at neutrality did not fool Muslims who saw only the Court's attack on their identity.

being protected or will be retained. Placing all religious personal law under the scope of the Constitution would only exacerbate this problem.

The Supreme Court, although eager to see Parliament enact a uniform civil code, cannot require action from the government, and therefore its ability to effect change in this arena is minimal. In sum, the Supreme Court cannot adequately remedy the problems resulting from religious personal laws because even when women are brave enough to assert their rights, the Court can only right one wrong at a time. And given the Court's tendency to offend minority sensitivities, it is possible that this piecemeal approach is not helping anyone, including women.

B. The Parliament Cannot Be Trusted

The answer to India's personal laws rests no more with the legislative branch than it does with the judiciary. Parliament simply cannot be trusted to implement a fair and legitimate uniform civil code, and any attempt to put forward a draft will only cause more chaos and strife. The reason that Parliament will not be successful in implementing a legitimate uniform civil code is twofold: (1) the politicians who most strongly support a code have overt Hindu-centered aims, making it difficult for minority groups to accept their ideas; and (2) as a result, any code that the government creates will merely reflect the brand of patriarchy espoused by the majority, and will not provide the gender equality required by Article 14 of the Constitution.

Professor Ayelet Shachar argues that no matter how democratic a country is, it "will always have certain cultural, linguistic, and historical traditions which welcome some of its members more completely than others, because the institutions of that society have been largely shaped in their image."⁸⁹ In India, this argument is validated by right-wing Hindu political parties, such as the Bharatiya Janata Party (BJP), who have advocated for the establishment of a Hindu state and a return to a sense of Hindu identity called *Hindutva*.⁹⁰ Given that the BJP is the strongest political proponent of a uniform civil code, minority groups within India rightly fear that a code presented to the nation as neutral and secular would in fact be a reflection of Hindu values.⁹¹

The uniform civil code that this Note argues for is one that provides for gender equality at its foundation. But this is certainly not the only sort of code, nor is it the probable code, that would result if drafted by Parliament. "The version championed by the Hindu right, for instance, is based on reforming other personal laws to make them similar to Hindu law, an eminently unsatisfactory situation given the extreme gender inequity within present law."⁹² Although the BJP has reformed its proposed uniform civil code recently,⁹³ its position has consistently been more focused on national

89. SHACHAR, *supra* note 45, at 23.

90. See Yildirim, *supra* note 60, at 915. The BJP has also attempted to pass a national ban on cow slaughter, an entirely Hindu issue. See *Cow Resolution Leaves Cong Red-Faced*, INDIAN EXPRESS, Apr. 11, 2003.

91. See Narain, *supra* note 41, at 62.

92. Srimati Basu, *The Personal and the Political: Indian Women and Inheritance Law*, in RELIGION AND PERSONAL LAW IN SECULAR INDIA, *supra* note 2, at 163, 164. "[T]his revised version is aimed at bringing Muslim men's rights 'down' to Hindu men's and is not really concerned with equity across genders." *Id.*

93. The BJP has recently stated that a uniform civil code, if introduced, will give more

integration—which could easily mean national assimilation of patriarchal values—than it has been on gender equality.⁹⁴

Politicians in Parliament who believe that the time is not yet ripe in India for a uniform civil code are correct insofar as it is not a good time for *Parliament* to draft the code. Parliament is clearly biased in favor of majority group values, and its commitment to gender equality has not been proved. This is not to say that Indians are not ready for *someone* to begin work toward a uniform civil code that takes into account the values of minority groups and the constitutional mandate of gender equality. Alternative approaches to legislative action require consideration.

C. Alternative Approaches to a Uniform Civil Code Are Insufficient

Given that the prospect for legislation on a uniform civil code is not realistic under current circumstances, a number of alternative approaches have been proffered by legal scholars and political theorists. Though not without merit, these methods nonetheless fail to address some of the core problems caused by the religious personal law system.

1. Option Plans

Any plan that provides Indians with the option to be governed either by a uniform civil code or by their religious personal laws is wholly incapable of providing women with real protection. Advocates of this view claim that an opt-in or opt-out provision respects group rights and protects individual autonomy by allowing people to choose the law that will govern them.⁹⁵ This argument misses two key problems, however. First, an option plan is facially misleading because “the majority of women in India do not enjoy the privilege of making choices about their rights.”⁹⁶ This “right of exit” approach thus offers no real solution for women, because it does not furnish an answer to this question: How does a woman realistically go about choosing between her community and her rights?⁹⁷

This leads to the second problem. It is patently unfair to place the “burden of resolving conflict upon the individual,” while “relieving the state of any responsibility for the situation.”⁹⁸ If the goal of a uniform civil code is to protect the community’s most vulnerable members, an option plan completely fails because it merely evades the

power to women, but has failed to say exactly how women will be benefited. *BJP MP Stresses Need for Uniform Civil Code*, HINDUSTAN TIMES, Feb. 25, 2006.

94. See Nilanjana Bhaduri Jha, *Does India Really Need a Uniform Civil Code?*, THE ECONOMIC TIMES (India), Aug. 3, 2003 (asserting that patriarchy is the basis of personal law, regardless of community, and that the BJP is less concerned with equality than national integration).

95. See Jain, *supra* note 31, at 206. Jain believes a uniform civil code with an opt-out provision will put pressure on minority groups to take the initiative in reforming their own laws. *Id.* She does not, however, address the possibility that those who need the protection of the secular code most will not have “the privilege to choose” anything at all.

96. PARASHAR, *supra* note 5, at 261. Parashar supports her argument against an option plan by noting that the Special Marriage Act of 1954, a secular act under which all Indians have the “option” of being governed, is only chosen by a small minority of Indians. Even within that minority, she speculates, the decision was most likely made by the men. *Id.*

97. See SHACHAR, *supra* note 45, at 41.

98. *Id.*

state's duty to secure women's rights while doing nothing to ensure that those rights can ever be exercised.

2. Dual Jurisdiction

Professor Ayelet Shachar advocates a theory of dual jurisdiction that she terms "transformative accommodation."⁹⁹ The theory gives the minority group and the state shared authority over personal law by assigning to each party a different aspect of the law so that neither has a monopoly over the other.¹⁰⁰ Its goal is to promote better responsiveness on the part of the state and group leaders by allowing individuals the opportunity to turn to one jurisdiction when dissatisfied with the other.¹⁰¹ However, Professor Shachar's optimistic proposal falls short of resolving the underlying problems of the personal law system. First, by her own words, exit strategies do not sufficiently protect women's rights.¹⁰² Second, dual jurisdiction increases the state's lack of neutrality by allowing the state to decide which areas of personal law should be governed by religion, and which should be governed by the state. Making these kinds of decisions further violates the secular principles of the Indian Constitution. It also provides minority groups with new fears of majority encroachment and loss of identity. Lastly, a dual jurisdiction model ignores the practical consequences of administering two systems of law to a group of people who already have enough trouble understanding their rights under the existing system.¹⁰³ Thus, maintaining the religious personal law system alongside a secular jurisdiction cannot remedy the problems arising from religious personal law. It will only add confusion to a system that vulnerable women already find difficult to navigate.

99. *Id.* at 117.

100. *See id.* at 131–32. Shachar gives an example of how marriage law could operate by allowing the group to keep its authority over demarcation (regulating marriage and offspring affiliation to the group) and giving to the state authority over distribution of material resources within the family group. *Id.*

101. *See id.* at 117–18.

102. *See id.* at 41 ("It is not at all clear how the accommodating non-intervening multicultural state envisioned by proponents of the 'right of exit' option is supposed to ensure that group members who wish to exit their traditional cultures can viably do so."). Further, Shachar does not explain who can choose when to switch jurisdictions. It is conceivable that both men and women will always want to defect to another jurisdiction if they come out losers in the first one.

103. *See Baird, supra* note 2, at 146–47. "In the family law arena, the findings indicate little or no knowledge of innovations in law. People do not know the minimum age of marriage, nor do they know that dowry is prohibited. There is also a near total lack of information concerning grounds of divorce." *Id.* at 147 (quoting UPENDRA BAXI, *TOWARDS A SOCIOLOGY OF INDIAN LAW* 62–63 (1986)). These observations were made in rural Hindu villages, but the inference can be reasonably drawn that rural Muslims are no more educated about their rights than Hindus.

3. Amending the Constitution

In an effort to secure gender equality, Pratibha Jain suggests amending the Constitution as an alternative to the uniform civil code.¹⁰⁴ Her suggested amendment would make “the rights to practice religion and conserve culture subject to ensuring the right of equality between men and women,” definitively making all personal law subject to the Constitution.¹⁰⁵ While this idea has its appeal and would make a nice runner-up if a uniform civil code simply became impossible, its primary problem is that it raises the same concerns addressed above regarding the Supreme Court’s handling of personal law issues.¹⁰⁶ The burdens on women who fight for their rights against community pressure, the inevitable piecemeal fashion in which cases are resolved, and the Supreme Court’s tendency to offend minority groups will all continue as these cases reach the Court’s bench. Even if Parliament could lighten the Court’s load by voiding laws wholesale, there is no indication that such actions would be accepted by minority groups.¹⁰⁷ Thus, for these reasons, even amending the Constitution to bring the religious personal laws under the Court’s certain scrutiny is no substitute for replacing the entire religious personal law system with a uniform civil code.

If the Supreme Court cannot remedy the problems created by the religious personal laws, if Parliament cannot be trusted to put forward its version of a uniform civil code, and if alternatives to the code are not sufficient to ensure gender equality and decrease inter-group tension, then from where should the solution come? It is the argument of this Note that a uniform civil code is needed, and that resistance to its implementation relates more to the process than to the idea itself. Part IV will address the procedural concerns and advocate a new way of arriving at a uniform civil code.

IV. THE PROCESS OF BUILDING CONSENSUS: THE ROAD TO A UNIFORM CIVIL CODE

In order to address the reactive culturalism occurring in the Muslim community and the deepened religious divide over the personal laws, a complete abrogation of the religious personal law system is necessary. Because this project is so ambitious, however, the government should proceed in stages that will keep religious groups involved in the process and on board with the ultimate objective of enacting a uniform civil code under which all Indians can be governed.

The central goal of the process described in this Part is to provide Indians of all religious communities a long, but defined, period of time in which (1) to reform their own personal laws, and (2) to contribute to the creation of a uniform civil code. By involving both men and women of the different religious groups in the discussion and final outcome, this plan strives to legitimize the process by encouraging internal reform. This, in turn, will hopefully de-emphasize the focus placed on majority-minority tensions by making each group responsible for its own reform and equally a part of the process of drafting the uniform civil code. The substantive component will be the requirement that all laws be consistent with the constitutional gender equality

104. Jain, *supra* note 31, at 221–22.

105. *Id.* at 221.

106. *See supra* Part III.A.

107. *See supra* Part III.B.

provisions. Ultimately, the result should be a uniform civil code that ensures gender equality and reflects the values of minority and majority communities alike.

A. Step One: Update All Religious Personal Laws

Control over the substance of religious personal laws must be kept in the hands of the leaders of the religious communities in order to ensure their legitimacy within the various groups. However, unlike past situations when the state professed neutrality as it handed power over to the conservative—and all-male—religious leaders, here the power to revise personal laws would rest in the hands of both male and female leaders within each community. A committee would be formed for each religion that has its own distinct personal laws.¹⁰⁸ Each committee would be comprised of its own religious members, and a quota system would be implemented to require that at least forty percent of the committee members be female with the same percentage requirement for males. In this way, neither gender dominates a committee, but a group need not concern itself with being exactly even.

Members of the committees would be appointed through a system of nomination and confirmation by Parliament, and requirements would be in place at the national level to ensure representation from all parts of India.¹⁰⁹ Appointment is preferred over election because (in rural areas especially) religious leaders such as Muslim clerics have an incredible amount of control over their uneducated constituents.¹¹⁰ Under these circumstances, it is doubtful that an election would produce a committee with members who are independent of the clerics' influence. Furthermore, Indians are not alien to the process of appointing members to committees charged with drafting personal law,¹¹¹ and they should not have trouble accepting the process of appointment over election. The appointed committees would agree to reformed laws by a supermajority of two-thirds and the resulting laws would go into effect without parliamentary interference at this stage.¹¹²

The primary goal of this stage of the process is to open up the debate over personal laws *within* religious communities. Rather than the entire debate taking place externally between bodies such as the BJP and the Muslim Law Board, forcing religious groups to take control over the substantive changes to their laws will hopefully "thaw" the internal dissent that is natural to all cultures.¹¹³ Committees

108. Accommodation would have to be made for Sikhs, Buddhists, and Jains, who are subsumed under Hindu personal law; they would require representation within the Hindu committees in some reasonable proportion.

109. Because no one religious group in India is so cohesive as to have the same cultural and religious practices throughout the country, a requirement that committee members come from geographically diverse areas will assist in getting all concerned voices to the table.

110. See *supra* note 77.

111. See PARASHAR, *supra* note 5, at 81 (discussing the Hindu Law Committee, whose members were appointed by the government).

112. While I think the Parliament should play a role in codifying the uniform civil code, this interim stage of the process does not warrant its oversight. Nevertheless, the reformed laws will unequivocally be subject to the Constitution, and the Supreme Court can interpret them accordingly.

113. See *supra* Part II.B. This approach will help to empower the marginalized voices in every religious community and allow those voices "to participate in the processes of cultural

would be required to tour communities and solicit input in the form of questionnaires from lawyers, judges, women's associations, and ordinary citizens.¹¹⁴ In this way, committees can draft revisions to the law that reflect the values of the community which are consistent with the equality provisions of the Constitution.

The secondary goal of this stage is to change the climate surrounding the future of a uniform civil code. Most scholars believe that *Shah Bano* was the turning point of the Muslim community's strong feelings regarding a uniform code.¹¹⁵ As discussed above, Muslims were angered over the decision because of its insulting tone toward Islam,¹¹⁶ and not necessarily because of the maintenance order. By guaranteeing Muslims a role in the transition from personal laws to a uniform civil code, this process should assuage the Muslims' fears that a code would only reflect majority values, thus encouraging them to take ownership of their contribution.¹¹⁷

If a guaranteed spot at the table is the carrot, a parliamentary committee to reform any religious law must be the stick in the event that a given group will not comply with this process. Members of the Constituent Assembly have "conceded that religious personal laws do not fall outside the competence of the State," and all religious groups should be reminded that there is no reason why the government cannot interfere in the realm of personal law.¹¹⁸ Ideally, minority groups will see it to their advantage to engage in reform within their own communities, and as a result, group members will accept their new laws as legitimate and Indian women will benefit immensely.

B. Step Two: Draft a Uniform Civil Code

Updating the religious personal laws will provide protection both for religious groups and for the women in those groups, while the next, much slower part of the process ensues: the drafting of a uniform civil code. Because minority groups' concerns about a uniform civil code stem from the idea that it will be written by the Hindu majority, and therefore reflect Hindu values, the committee to draft the uniform civil code must comprise the entire cross section of religious groups, while maintaining the same gender quota as in the previous stage. Essentially, equal numbers of members from each of the personal law revision committees will be appointed to a committee to draft a uniform civil code—the Drafting Committee.

This stage is designed to provide a comfortably long, but definite, time period for national debate on a uniform civil code. Adjustment will no doubt take time, and there is no gain in pushing forward a plan on an unwilling public; the code must be wanted in order to be ultimately accepted. This stage may further be subdivided into distinct

meaning-making." Sunder, *supra* note 44, at 1468.

114. This was how the Hindu Law Committee researched public opinion and how it supported its conclusions. See PARASHAR, *supra* note 5, at 81–82.

115. See, e.g., Nussbaum, *supra* note 19, at 45.

116. See *supra* Part III.A.

117. Speaking on the advantages of reforming individual religious personal laws, Parashar states that "minority communities would not feel imposed upon or oppressed by the tyranny of the majority. This could be a tremendous advantage in generating within the minority communities a feeling of belonging and of being a part of the nation which in turn would help consolidate the nation-building efforts of the State." PARASHAR, *supra* note 5, at 244.

118. *Id.* at 236.

periods of information gathering, debate, and proposals to aid its transparency and legitimacy.¹¹⁹

The primary goal of this stage is to ensure legitimacy in the process by leaving no concerned voices out of the discussion.¹²⁰ The Drafting Committee will have no majority religion. As long as gender equality is provided for, no single religion's values will be given special weight. Therefore, to obtain the required two-thirds supermajority, the religions will need to work together and form coalitions to achieve their objectives. Unlike the previous stage, Parliament will play a role in codifying the Drafting Committee's uniform civil code. Parliament's obligation will be more procedural than substantive, however, and barring obvious inconsistencies with constitutional gender equality provisions, Parliament will pass the code into law for all Indians without interference.¹²¹

The secondary goal of this stage is to fulfill Article 44 of the Constitution. Following through on a uniform civil code will demonstrate that India takes women's rights seriously. The uniform civil code should serve as a vehicle for the realization of women's equality in India. According to Professor Parashar, when all religious personal law is replaced by a uniform civil code that prioritizes gender equality over religious rights, there will be a two-fold effect of easing religious tensions and holding the state accountable for women's rights:

For if a civil code enumerates legal rights without reference to the various religious personal laws, then no community can legitimately argue that its religion is being superseded by the religion of other communities. At the same time the State will no longer be able to justify legal inequality for women on the ground that it does not want to hurt the religious sentiments of some communities.¹²²

Thus, the creation of a uniform civil code will finally place the state in the position it has sought since the members of the Constituent Assembly abolished reserved seats for minorities on the grounds that separate treatment deepens the divide between religious groups.¹²³ Furthermore, the government will no longer be able to hide behind the religious personal laws and shirk its duty to women. Through this process, women's

119. This idea is borrowed from the European Union's Convention on the Future of Europe, held in 2002, which progressed in three stages: the listening stage, the examination stage, and the proposal stage. PAUL CRAIG & GRÁINNE DE BÚRCA, *EU LAW: TEXT, CASES, AND MATERIALS* 32 (4th ed. 2007). Proceeding in such stages would allow the Drafting Committee the opportunity to hear all sides of the debate, while maintaining transparency, and thus would bolster its legitimacy.

120. This notion is supported by Vrinda Narain, who believes that "the State must strive to reach a consensus by the construction of dialogue, which includes not just the perspective of the male-dominated collectivity of Muslims, but one that is also informed by the specificity of Muslim women." Narain, *supra* note 41, at 65.

121. My assumption here is that, in accordance with Article 44, the Parliament itself has set this proposal into motion. In so doing, it has relinquished much of its role in the substantive drafting of the code. By exchanging its power to draft the code for greater legitimacy, Parliament will essentially serve as a "rubber stamp." Barring extreme results, Parliament will only perform the procedural function of codifying the bill into law.

122. PARASHAR, *supra* note 5, at 255.

123. See *supra* Part I.B.

equality will be protected by law, and all religious groups will have played a role in making that possible.

C. Step Three: Oversight and Continued Reform

Once the legal mechanisms for women's equality are in place in the form of a uniform civil code, the attention of the Indian government must turn to the reality that many Indian women are neither aware of their rights nor how to exercise them.¹²⁴ A code that provides women with equality does nothing if women do not know it exists. Therefore, the final stage in this process is for Parliament to establish a permanent commission for gender and religious concerns ("the Commission"), which will exist for the primary purpose of transforming legal equality into actual equality.

The Commission's composition would be similar to the previous committees in that it would include all of the religious groups and apply the same gender quota. However, the members would be elected for limited terms by the populace because by this time, the traditional leaders will have hopefully lost their grip on their communities. Also, elections would be preferred to the appointment process previously used because in order to fulfill their role, it is important that the members of the Commission maintain their independence from Parliament.

The Commission would be charged with the task of making the law more accessible to women generally, as well as to women belonging to the various religious groups. In this way, the Commission will acknowledge that a uniform civil code is not necessarily the "magic alternative,"¹²⁵ and that Muslim women will still face problems particular to their community, Hindu women will face distinctly Hindu problems, and so forth. By recognizing that discrimination can be intersectional—that is, it is based on a combination of two or more legally prohibited grounds¹²⁶—the Commission can more fully address the problems facing Indian women.

The state must take an affirmative role in "ensuring that women are given access to educational and economic opportunities so that they will have the critical tools to challenge received norms and to make the world their own."¹²⁷ The Commission would serve this function by promoting educational reform and changing underlying assumptions about women in the various patriarchal religious communities. With the gender literacy gap in India standing at twenty-five percent,¹²⁸ girls are clearly not given the priority they require, and the Commission would need to make the education of girls a central issue on its agenda.

The authority of the Commission would be similar to that of the Commission for Gender Equality in South Africa, which is empowered to "monitor, investigate,

124. In one survey of 200 Hindu rural women, only twelve had any knowledge of the Hindu Succession Act that governs inheritance rights for Hindus. Baird, *supra* note 2, at 147.

125. See Basu, *supra* note 92, at 164.

126. See, e.g., Leland Ware, *People of Color in the Academy: Patterns of Discrimination in Faculty Hiring and Retention*, 20 B.C. THIRD WORLD L.J. 55, 69 (explaining "intersectional discrimination" as the combination of bias based on both race and gender).

127. Sunder, *supra* note 44, at 1468.

128. Nussbaum, *supra* note 19, at 35. The literacy rate of men is sixty-five percent, while women stand at around forty percent. *Id.*

research, educate, lobby, advise and report on issues concerning gender equality.”¹²⁹ It would also share characteristics of South Africa’s Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities.¹³⁰ Further, the Commission would explicitly be guaranteed the following: adequate funding to make nationwide campaigns, access to governmental records for research purposes, independence from the legislature in order to retain legitimacy, and the right to propose legislation to Parliament that reflects its findings on the status of women in India.

This plan for the implementation of a uniform civil code aims to allay the fears of minority groups through its process of including a wide spectrum of voices in the discussion. It further aims to challenge the patriarchal assumptions about women by making gender equality the substantive goal of the code. By doing so, the hope is that the resulting uniform civil code will be accepted by all religious communities, and that the constitutional promise of gender equality will at last be given effect. Finally, the continued monitoring of gender and religious concerns by the Commission should advance reforms that are necessary for women to take advantage of their newly achieved equality.

CONCLUSION

India’s Constitution deserves praise for its forward-thinking commitment to gender equality. However, its provisions are hollow promises if the laws governing women’s most intimate relationships are not subject to real constitutional scrutiny. The state cannot continue to abdicate its duty to provide women with equal rights to men under the guise of protecting religious groups. What upsets minority religious groups’ sentiments is not the idea of gender equality; it is the idea that the state will provide that equality by encroaching upon their rights and threatening their identity. But a process that envisions integral involvement by religious groups in the drafting of a uniform civil code can dispel minorities’ fears that their values will be ignored by the majority.

By further involving both men and women of religious communities in the process, and stipulating that their end product must conform to the constitutional equality guarantees, religious communities will be enabled to reform from within and group identity will lose its attachment to patriarchal personal laws. The uniform civil code can therefore be legitimized by the populace and provide substantive gender equality. Both are needed for a uniform civil code to have any chance of effecting positive change in the lives of real Indian women. If successful, India will have achieved its goal of promoting a secular state that values both the individual and her place within a religious community.

129. S. AFR. CONST. 1996 ch. 9, § 187(2).

130. See S. AFR. CONST. 1996 ch. 9, § 185. This commission aims “to promote and develop peace, friendship, humanity, tolerance and national unity among cultural, religious and linguistic communities, on the basis of equality, non-discrimination and free association.” *Id.* at ch. 9, § 185(1)(b).

